STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Fitzgerald, P.J., and Zahra and Fort Hood, JJ.)

MICHIGAN DEPARTMENT
OF CIVIL RIGHTS ex rel BERNETTE
BURNSIDE,

Claimant-Appellee,

vs.

FASHION BUG OF DETROIT, INC.,

Respondent-Appellant.

Supreme Court No. _____

Court of Appeals No. 240325 opp 2/19/04

Wayne Circuit No. 01-116726-AA

MDCR No. 122300-EM06 Wayne L. Simons

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RESPONDENT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

25706

STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM AND INDICATING THE RELIEF SOUGHT

Respondent-Appellant seeks leave to appeal from the February 19, 2004 decision of the Court of Appeals (Fitzerald, P.J., and Zahra and Fort Hood, JJ.) affirming the Wayne County Circuit Court's decision awarding damages to Claimant-Appellee under the Civil Rights Act ("CRA"), MCL 37.2101 *et seq*. (Exhibit A.) The 42-day time for filing this application runs from the April 16, 2004 order denying Respondent-Appellant's Motion for Reconsideration. (Exhibit B.)

For relief, Respondent-Appellant seek, in the alternative: (*i*) an order granting Respondent-Appellant's application for leave to appeal, (*ii*) an order peremptorily reversing the Court of Appeals decision, (*iii*) a per curiam opinion reversing the Court of Appeals on the basis of this application, or (*iv*) an order remanding the case to the Court of Appeals with instructions to address the issue left unresolved in its initial opinion.

STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in *failing to address* Respondent-Appellant's argument that the record contained no factual support for the Circuit Court's finding that Claimant-Appellee (an African American and non-supervisory employee) was treated differently from a "similarly situated" white supervisory employee?

The Court of Appeals answered "No."

Claimant-Appellee presumably would answer "No."

Respondent-Appellant answers "Yes."

II. Where Claimant-Appellee and the white supervisory employee held different positions within the company, and were accused by different persons of engaging in different behavior, did the fact that Respondent-Appellant responded differently to the accusations support a presumption of disparate treatment of "similarly situated" employees?

The Court of Appeals did not address this question.

Claimant-Appellee presumably would answer "Yes."

Respondent-Appellant answers "No."

III. Where Respondent-Appellant asserted in good faith that it terminated Claimant-Appellee's employment for a violation of company policy, did the Court of Appeals err as a matter of law in concluding that evidence Claimant-Appellee did not, *in fact*, violate the company policy demonstrated discriminatory animus?

The Court of Appeals answered "No."

Claimant-Appellee presumably would answer "No."

Respondent-Appellant answers "Yes."

IV. Did the Court of Appeals err as a matter of law when it concluded that an allegedly discriminatory remark made by another employee with no authority to terminate Claimant-Appellee's employment was attributable to Respondent-Appellant merely because the co-employee's complaint about Claimant-Appellee's behavior *initiated* the investigation of Claimant-Appellee?

The Court of Appeals answered "No."

Claimant-Appellee presumably would answer "No."

Respondent-Appellant answers "Yes."

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INTRODUCTION

Respondent-Appellant Fashion Bug of Detroit, Inc. ("Fashion Bug") has suffered a substantial miscarriage of justice in this case. Claimant-Appellee Bernette Burnside's race discrimination claim is woefully deficient as a matter of fact and law. It is not surprising that the only person who actually heard live testimony in this matter—Michigan Department of Civil Rights ("MDCR") hearing officer Benjamin J. Kerner—recommended a dismissal of Ms. Burnside's charges against Fashion Bug. Since that initial favorable ruling, however, the parties' fortunes have reversed. As a result of errors made by the Michigan Civil Rights Commission ("MCRC") and amplified by the Wayne County Circuit Court and the Michigan Court of Appeals (Fitzgerald, P.J., and Zahra and Fort Hood, JJ.), Fashion Bug now finds itself liable to Ms. Burnside for a substantial award of damages, attorney fees, and interest. Fashion Bug has also suffered the stigma of being deemed liable for unlawful race discrimination despite the fact that it harbored no racial animus and acted for purely race-neutral reasons. Accordingly, pursuant to MCR 7.302(B)(5), Fashion Bug respectfully asks this Honorable Court to cure this miscarriage of justice.

The Court of Appeals' decision that is the immediate subject of this application for leave to appeal contains three substantial errors. First, the Court of Appeals *failed to address* Fashion Bug's argument that the record lacks support for the Circuit Court's finding that Ms. Burnside (an African-American female and non-supervisory employee) was "similarly situated" to fellow employee Teresa Jawoszek (a white female supervisor). Fashion Bug expressly argued in its Court of Appeals brief that the record did not support the Circuit Court's finding on the issue. Nevertheless, the Court of Appeals opinion inexplicably states that Fashion Bug "did not challenge" the Circuit

Court's finding that Burnside and Jawoszek were "similarly situated." This error alone merits a remand to the Court of Appeals. But the error is not simply one of process. Had the Court of Appeals actually considered Fashion Bug's argument based on the record, it would—or should—have realized that Ms. Burnside and Ms. Jawoszek were *not* "similarly situated." Ms. Burnside and Ms. Jawoszek held different positions within the company. They were also accused by different persons of engaging in different acts having different consequences. The only similarity is that both were employed by Fashion Bug.

Second, the Court of Appeals utilized faulty logic—out of keeping with basic civil rights law—to conclude that Ms. Burnside had put forth sufficient evidence to show that Fashion Bug's proffered nondiscriminatory reason was pretextual. In short, Fashion Bug terminated Ms. Burnside for violating (or attempting to violate) a specific company policy regarding employee returns of store merchandise. Ms. Burnside argued that she did not, in fact, violate the company policy. The Court of Appeals panel reasoned that Ms. Burnside's evidence that she did not *actually* violate the company policy constituted valid evidence of pretext. This makes no sense. The question whether Fashion Bug was factually correct in its determination that Burnside violated the policy is irrelevant because it has nothing to do with the question whether Fashion Bug acted with discriminatory animus. An employer is entitled to be factually "wrong," so long as it acts in good faith with a race-neutral purpose. The bench and bar would benefit from an opinion clarifying the misconception that factual inaccuracy regarding the proffered reason constitutes evidence of pretext.

Third, the Court of Appeals erroneously held that a co-worker's allegedly discriminatory comments were attributable to Fashion Bug despite the undisputed facts that the co-worker (1) had no authority to terminate Ms. Burnside's employment and (2) took no part in the decision to do so. The panel concluded that the co-worker's comments were attributable to Fashion Bug because the co-worker (like *all* Fashion Bug employees) was an "agent" of Fashion Bug. The panel also relied on the fact that the co-worker's complaint about Ms. Burnside's conduct had *initiated* the investigation that ultimately led to Ms. Burnside's termination. That is not enough. A comment made by a co-employee not participating in the decision-making process cannot be relevant to the question whether the employer acted with discriminatory animus.

For these reasons, Fashion Bug respectfully asks this Court to exercise its discretion and grant relief, in some form, to Fashion Bug. This relief could be (i) an order granting Fashion Bug's application for leave to appeal, (ii) an order peremptorily reversing the Court of Appeals decision, (iii) a per curiam opinion reversing the Court of Appeals, or (iv) an order remanding the case to the Court of Appeals with instructions to address the issue left unresolved in its initial opinion. This Court may also wish to adopt as its own (1) hearing officer's Kerner's legal conclusion that Ms Burnside's story did not support a claim of unlawful race discrimination or (2) the opinion of the dissenting member of the MCRC, who likewise found no legal basis for Ms Burnside's claim of race discrimination, although using a somewhat different analysis.

STATEMENT OF THE MATERIAL PROCEEDINGS AND FACTS

The Hearing Officer's Factual Findings & Recommendation. After taking the only testimony ever given in this case, MDCR hearing officer Kerner set forth a neutral

statement of facts that nicely describes the events giving rise to Burnside's race discrimination claim against Fashion Bug:

> Ms. Burnside was employed as a sales associate by The Fashion Bug of Detroit at its 8-Mile Road location beginning on or about May 26, 1990. Her job consisted of assisting customers with the purchase of clothes [exclusively women's clothes]. Ms. Burnside, herself, was extremely fond of clothes, and testified that she sometimes spent her whole paycheck on new clothes; and usually shopped 3 times per week. One of the places Ms. Burnside shopped was The Fashion Bug, sometimes at the location where she was employed, sometimes at other locations, such as Store 173 in Warren, Michigan.
>
> At all The Fashion Bug locations in and around Detroit, management had a policy related to employee-customers who might, from time-to-time, attempt to return or exchange merchandise. The policy was that such employee-customers must, as a condition of obtaining refunds or exchanges of their Fashion Bug merchandise, present a sales receipt. In addition, according to Regional Supervisor Debbie Kerins, District Manager Elaine Landolfe, and store manager Teresa Jawoszek, an employee-customer must identify herself as an employee, i.e., she must have her store identification tag and one other piece of picture I.D.
>
> Non-employee customers, by contrast, were frequently asked to produce receipts but were not rigorously required to have receipts. A manager, or other person authorized to issue refunds or take exchanges, could and sometimes did perform those transactions for non-employee customers without the benefit of the customer's having a receipt.
>
> The purpose of the policy regarding employee-customers is quite clear, based on the testimony of all concerned, including Claimant: Employees enjoyed a substantial discount at all Fashion Bug stores. If an employee from one store were permitted to return items purchased at another Fashion Bug outlet without a receipt, then there would be an opportunity for scamming the corporation by returning merchandise for full value when it was purchased at discounted value. Similarly, if an employee-customer could return merchandise through another person, say, a sister or a friend, i.e., without producing positive identification of the employee's status as an employee of one of The Fashion Bug stores, then the sister or friend could, in effect, act as an agent or part of a scam, by obtaining full value refunds of merchandise bought at discounted prices. For these reasons, at the stores in the Detroit area and in Respondent's stores throughout the region generally, management insisted on the policy above-stated with complete scrupulosity.
>
> Ms. Burnside, it was established, was aware of the policy pertaining to employee-customers. She had been the recipient of discounted merchandise many times, using her employee I.D., under recognized store policy. She had

also returned merchandise a number of times, and in doing so, was generally required to establish her status as an employee and to produce a receipt.

The evidence establishes that Ms. Burnside had shopped at Store 173 on at least three occasions prior to September 1991. She had also shopped there with her twin sister, Benita Withers. According to one manager who knew the Claimant well [Sharon Mitchell-Harvey], Burnside and Withers were sufficiently alike in their appearances that the manager could not always tell Bernette Burnside, the employee, from her sister, Benita Withers, who was not an employee.

On September 29, 1991, Claimant visited Store 173 with her twin sister, Benita Withers and others including her sister's daughter [aged approximately 18], her sister's son [aged approximately 4], and her sister's grandchild [aged approximately 1-1/2] and possibly one other mature female friend. All were African-American. Ms. Withers, not Ms. Burnside, carried a large yellow shopping bag. It was full of clothes, some of which Ms. Burnside wanted to return, one of which Ms. Burnside wanted to exchange. When Ms. Burnside had found her new merchandise [for exchange], she proceeded to the counter, where she was met by Theresa Jawoszek, store manager. Ms Jawoszek, in accordance with store policy, requested Ms. Burnside to show her receipt for the merchandise she had bought with her into the store. Ms. Burnside had a receipt, but it identified only two items of approximately 9 or 10 items in the yellow shopping bag. The receipt did not identify the item proffered for exchange.

Further, at that time, Ms. Burnside did not have her store I.D. on her person. Ms. Jawoszek began the process of calling to the 8 Mile Road store to establish Ms. Burnside's identity as a Fashion Bug employee. Recognized policy allowed the cashier to call the store where the employee in question worked [as an alternative way of obtaining positive I.D. in the emergency that an employee did not have her picture I.D.]. Such a procedure would suffice to establish the individual's employee status.

In the course of these activities, Ms. Burnside placed the new merchandise [for exchange] on the counter – it was a pleated skirt – and requested Ms. Jawoszek to place it on a hanger. Ms. Jawoszek protested that she did not do things that way in her store. Ms. Burnside replied that at *her* store, it was store policy to provide a hanger whenever requested by a customer. At some time during this brief interchange between Ms. Jawoszek and Ms. Burnside, Ms. Jawoszek [a white person, in a store staffed predominantly by whites] said with a wave of her arm to those on the other side of the counter [including Ms. Withers and her children and grandchild], "You people hang your clothes on hangers?"

Ms. Burnside was upset by this remark, explaining at hearing that she experienced it as racist; and that she expected others, such as sales staff in Store

173, to show the same courtesies that she, herself, showed to customers at the 8 Mile Road store.

Ms. Withers, hearing the same comment, approached the counter. She was upset. She challenged Ms. Jawoszek to explain what Ms. Jawoszek meant by, "You people." In her own defense, Ms. Jawoszek replied that "you-all" are the people, pointing to Ms. Burnside and her family members; and that we are all individuals [waving her hands around the room and at others on her side of the counter].

This remark was evidently interpreted by both Ms. Withers and Ms. Burnside as racist. In Burnside's mind, later reviewing the incident, and given the fact that she was discharged shortly thereafter [on October 18, 1991], the remarks made by manager Jawoszek at Store 173 were evidence of a racist attitude; were evidence of a clear unwillingness to extend to Blacks the same courtesies that would usually be extended to whites, (according to Ms. Burnside); and were (in Ms. Burnside's eyes) a reflection of Ms. Jawoszek's racially-based hostility toward Ms. Burnside, herself.

These remarks, and the racial tension they engendered at Store 173 on that day in September 1991 are the heart of the Claimant's allegation of racial reasons motivating her discharge.

In the following two weeks, store management did an investigation. That investigation consisted of collecting the written comments of all employees of Store 173 who witnessed the events. When assembled, these comments were reviewed by the regional supervisor. Regional supervisor Manager Debbie Kerins made the effective decision to discharge Ms. Burnside, upon review of the statements of all story employees present on September 29, 1997. Her reasons were explained in her own words:

> I went in [to the termination interview] and I sat her down and I asked her to quote to me our company policy returning-concerning associate returns. So she quoted the policy to me. And I said to her, "Then tell me why you are going into our stores, returning large bags of merchandise without receipts." And at that point, she blew up....And I said, "Well, I have statements from our stores that explains misconduct in our stores." [Exhibit 16, pages 7-8]

Claimant did not wait for the end of the interview with regional manager Debbie Kerins. Claimant left the back room at the 8 Mile Road store where that interview occurred, walked out of the store. According to some reports, she was yelling at the managers; according to other reports, she was in tears. She never returned.

[Appendix A, Report and Recommendation of Hearing Officer Benjamin A. Kerner, pp 3-7.] Hearing officer Kerner then recommended that Ms. Burnside's claim be dismissed because she had "failed to produce any evidence which would lead a reasonable person to believe that any racial animus shown towards her at the Warren store was a factor, much less a determinative factor in the decision to discharge Claimant from employment at the 8 Mile Road store." (Appendix A, p 10).

Hearing officer Kerner's statement of facts is not disputed. Ms. Burnside merely argues that they do not paint a complete picture. She contends that certain additional facts, involving a *separate* incident between Ms. Jawoszek and Ms. Withers, are crucial to her claim of discrimination. To an extent, she is correct. The additional facts upon which Ms. Burnside's claim relies (which are set forth below) were the impetus for her victories before the MCRC, the Wayne Circuit Court, and the Michigan Court of Appeals. However, these additional facts do not support any valid *legal* basis for a finding of unlawful discrimination by Fashion Bug and should not have prompted the MCRC, et al., to reject Kerner's sound recommendation to dismiss Ms. Burnside's claim.

The Withers-Jawoszek incident. Ms. Burnside prevailed in the MCRC (and on appeal) by relying on *additional* facts that were apparently deemed to be irrelevant by hearing officer Kerner. These facts involved a separate incident between Ms. Withers (the identical twin sister of Ms. Burnside) and Ms. Jawoszek. To be as fair as possible to Ms. Burnside, the following description of the Withers-Jawoszek incident is taken directly from Ms. Burnside's response to Fashion Bug's motion for reconsideration in the Court of Appeals:

> A few days later [after the initial incident of September 29, 1991, at the Warren store], Ms. Withers returned to the Warren store to exchange clothing

she had purchased from [Fashion Bug's] store in Detroit. [Appendix E, p 131.] Ms Jawoszek refused to allow Ms. Withers to make an exchange because she did not have a receipt showing that she had purchased the clothing. Id. at 132. Ms. Withers asked Ms. Jawoszek to put her refusal in writing and Ms. Jawoszek complied with the request. Id. Believing that Ms. Jawoszek's refusal to allow an exchange was contrary to Defendant's policies, Ms. Withers left the store and called [Fashion Bug's] headquarters in Chicago to complain about the incident of September 29, 1991 and her belief that she and her sister had been discriminated against because of their race. Id. at 134-135. Ms. Withers also complained about Ms. Jawoszek's refusal to allow her to exchange clothing for other clothing which Ms. Withers believed to be contrary to Defendant's policies. Id.

It is clear that Ms. Jawoszek's refusal to allow Ms. Withers to exchange clothing for other clothing without a receipt was indeed contrary to [Fashion Bug's] policies. District Supervisor Elaine Landolfe so testified:

A. Well, there's a difference between working for the company and customers.

Q. So if a customer wanted to exchange an item without a receipt, that was possible?

A. Yes, you could make an exchange; correct. That's good customer service.

* * * * *

BY MR. NAVARRO:

Q. So it was possible for a customer to exchange an item of clothing based on ***the policy*** without a receipt.

A. Yes. Id. at 389-390. (emphasis added)

[Appendix F, Ms. Burnside's response to Fashion Bug's motion for reconsideration, p. 2.][1]

It is undisputed that Fashion Bug did not impose any discipline on Ms. Jawoszek for allegedly refusing to accept the Withers return. It is also undisputed that Fashion Bug's investigation of the entire situation involved only taking statements from its

[1] As demonstrated below in Part B of the Argument section, Landolfe's testimony merely showed that Fashion Bug's company policy with respect to employee returns *did not extend to* returns by ordinary customers. There is no evidence that Fashion Bug ever had any formal policy forbidding its employees from refusing to accept customer returns where the customer lacked a receipt.

employees at the Warren store (where everything occurred) who all happened to be white.

The Ruling of the Civil Rights Commission. Based on a comparison between Fashion Bug's treatment of Ms. Burnside for allegedly attempting to return merchandise without a receipt and Fashion Bug's treatment of Ms. Jawoszek for allegedly refusing to accept a return from a customer without a receipt, a majority of the MCRC panel concluded that Ms. Burnside had made out a claim of race discrimination under the burden-shifting analysis of *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Specifically, the majority noted (1) that Fashion Bug sought statements only from Jawoszek, and Jawoszek's employees, with respect to each incident, and (2) that Fashion Bug did not impose the same discipline on Jawoszek (for refusing to accept Withers' customer return), that it had imposed on Ms. Burnside (for allegedly making an employee return without a receipt). (Appendix B, MCRC Opinion, pp 7-8). The majority then found that Fashion Bug's stated reason for terminating Ms. Burnside was pretextual, because the record did not show that Ms. Burnside *actually* returned merchandise without a receipt. (Appendix B, pp 9-10).[2] Even the majority, however, found that the alleged "you people" remark of Ms. Jawoszek did *not* constitute evidence of racial discrimination. (Appendix B, pp 8-9).

One member of the commission dissented from the MCRC's conclusion. In his view, Ms. Burnside failed to make out a prima facie case of discrimination. (Appendix B, p 13). The dissent noted that Ms. Burnside and Ms. Jawoszek were not "similarly situated," because Ms. Jawoszek was a supervisor who allegedly committed a policy

[2] Although not relevant to this application, the record actually *did* show that Ms. Burnside attempted to return store merchandise without a receipt. (Appendix E, pp. 186-187).

violation with respect to a customer, while Ms. Burnside was an employee who allegedly committed a policy violation against Respondent itself. Although both alleged violations involved the return policy, they were entirely different in nature. (Appendix B, p 14). The dissent also noted that Fashion Bug had no policy that required it to interview all parties involved in an alleged violation. In the dissent's view, it was "beyond the purview of discrimination laws" to require specific investigatory procedures where the business decisions of the employer "are not predicated upon discriminatory animus." Because Fashion Bug had no specific investigatory policy, there was no evidence that it applied the policy differently to African-American and white employees. (Appendix B, pp 14-15).

The Opinion of the Circuit Court. Upon review of the cold record, the Circuit Court affirmed the opinion of the MCRC by expressly adopting the MCRC's findings (Appendix C, p 8) and by employing the same legal analysis (Appendix C, pp 12-19). To bolster its conclusion, however, the Circuit Court additionally opined—contrary to the MCRC's conclusion—that Ms. Jawoszek's "you people" statement (while not *per se* evidence of racial or ethnic hostility), supported an inference of "racially hostile intent" in Jawoszek, "which can be said to have played a role in the entire process which led to the termination of Burnside," and thus provided an "alternative basis" for finding that the reason proffered by Respondent "was a pretext for racial discrimination." (Appendix C, pp 19-21).

The Opinion of the Court of Appeals. In similar fashion to the Circuit Court, the Court of Appeals merely accepted the findings and reasoning of the court/tribunal that it followed. In rejecting Fashion Bug's arguments, however, the Court of Appeals made

three substantial errors, which are described in detail in the Introduction and Argument sections of this Application. Specifically, the Court of Appeals (1) failed to consider Fashion Bug's argument that the record lacked support for the Circuit Court's finding that Ms. Burnside (an African-American female) was "similarly situated" to fellow employee Teresa Jawoszek (a white female) (Appendix D, Court of Appeals opinion, pp 2-3), (2) erroneously ruled that Ms. Burnside's evidence that she did not *actually* violate the company policy constituted valid evidence of pretext (Appendix D, pp 3-4), and (3) erroneously held that a co-worker's "you people" comments were attributable to Fashion Bug despite the undisputed facts that the co-worker had no authority to terminate Ms. Burnside's employment and took no part in the decision to do so (Appendix D, p 4).

STANDARD OF REVIEW

The Court of Appeals reviewed the entire matter under the clearly erroneous standard of review. Arguably, this is the correct standard to apply to the Circuit Court's "findings of fact."[3] See, e.g., *Michigan Dep't of Civil Rights ex rel Johnson v Silver Dollar Café* (On remand), 198 Mich App 547, 549; 499 NW2d 409 (1993). However, to the extent this appeal turns on mixed questions of fact and law (*i.e.*, the application of facts to a legal standard), this Court's review is de novo. *Johnson v Harnischfeger Corp*, 414 Mich 102, 121; 323 NW2d 912 (1982).

[3] Because the Circuit Court reached its conclusion based on a review of the cold record, without hearing testimony, there is arguably no sound reason to defer to the Circuit Court as an especially-qualified "factfinder." The only fact-finder to actually hear testimony in this case was Magistrate Benjamin Kerner, who ruled in favor of Fashion Bug. In any event, even accepting the Circuit Court's factual findings (as to what actually transpired) as true, Ms. Burnside's claim is *legally* deficient.

ARGUMENT

A. *As an initial matter, the Court of Appeals failed to address Fashion Bug's argument that the record is devoid of factual support for the Circuit Court's finding of disparate treatment.*

In affirming the Circuit Court decision, the Court of Appeals explained that the Circuit Court had found (1) that Ms. Burnside and her fellow employee, Ms. Jawoszek, had been accused of "violating the same company policy," and (2) that Fashion Bug's investigation of Ms. Burnside was different than its investigation of Ms. Jawoszek. The Court of Appeals then stated—inexplicably—that Fashion Bug "[did] not challenge [the Circuit Court's] factual findings" on these points. (Appendix D, p. 2). The statement that Fashion Bug *did not challenge* the Court of Appeals factual findings is incorrect. To the contrary, Fashion Bug specifically argued in its Court of Appeals brief that "the record" did not support the Circuit Court's finding that Ms. Burnside and Ms. Jawoszek were "similarly situated." (See Fashion Bug's Court of Appeals Brief, pp. 20-22). Fashion Bug was entitled to argue—and did argue—that the Circuit Court's findings were not supported by the record. It was therefore entitled to a ruling from the Court of Appeals on the issue.

Because the Court of Appeals erroneously believed that Fashion Bug did not challenge the Circuit Court's "findings," it accepted them without question. (Appendix D, pp 3-4). Accordingly, the Court of Appeals conclusion that Ms. Burnside made out a *prima facie* case of disparate treatment discrimination based on the Circuit Court's "finding" that Ms. Burnside and Ms. Jawoszek were treated differently for "violating the same company policy" was not responsive to Fashion Bug's argument that Ms. Burnside and Ms. Jawoszek were *not*, in fact, accused of "violating the same company policy." As

set forth below in Part B, there was only one company policy. Only Ms. Burnside was accused of violating that company policy.

B. *Nothing in the record supports the Circuit Court's finding that Burnside and Jawoszek were "similarly situated".*

Ms. Burnside was terminated for attempting to violate a specific company policy regarding employee merchandise returns. Ms Jawoszek, on the other hand, was accused by Ms. Burnside's sister (Ms. Withers) of providing poor customer service. Because Ms. Burnside and Ms. Jawoszek were accused by different persons (one an employee and the other a customer) of engaging in different actions, the fact that Fashion Bug responded differently to the accusations does not support a presumption of disparate treatment discrimination. The trial court's finding to the contrary was clearly erroneous.

The record in this case shows (1) that there was only *one* company "policy" regarding merchandise returns, (2) that the policy addressed only *employee* merchandise returns, and (3) that Ms. Jawoszek could not have "violated" that policy because the accusation against her arose from a transaction with a non-employee customer.

It is undisputed that Ms. Burnside was accused, by another employee (Ms. Jawoszek), of attempting to return store merchandise without a receipt in violation of Fashion Bug's official employee return policy. Ms. Burnside admitted that Fashion Bug required all employee returns to be made within fifteen days of purchase accompanied by a receipt. (Appendix E, Hearing Transcript, pp. 18-19). Ms. Burnside's store manager, Sharon Mitchell-Harvey (also African American), testified that she repeatedly had to explain Fashion Bug's employee-return policy to Ms. Burnside. (Appendix E, pp. 290-291). Deborah Kerins, the Regional Supervisor who decided to terminate Ms. Burnside's employment, testified that Fashion Bug's regional policy required employee merchandise

returns to be accompanied by a receipt. Fashion Bug instituted the policy because it "had a lot of problems within the region on returns." Finally, Ms. Kerins explained that Ms. Burnside was terminated because of a violation of Fashion Bug's employee return policy. (Appendix E, pp 439-441).

With respect to the accusation against Ms. Jawoszek, the record shows only that a customer (Ms. Burnside's twin sister, Ms. Withers) telephoned Fashion Bug's headquarters in Chicago to complain that Ms. Jawoszek had refused to accept her customer exchange without a receipt. (Appendix E, pp 131-134). Ms. Burnside argued that Fashion Bug's "policy" was to allow customers to exchange clothing without a receipt. (See Ms. Burnside's Court of Appeals brief, pp 6-8). In support of this assertion, she relies on the testimony of Fashion Bug's district manager, Elaine Landolfe, who testified that the policy requiring employees to have receipts did not extend to customers. Ms. Landolfe opined that it was "good customer service" to allow ordinary customers to make exchanges without receipts. (Appendix E, pp. 388-390). Ms. Burnside also relied on Ms. Jawoszek's testimony that Fashion Bug did not require ordinary customers to have receipts in order to exchange merchandise. (Appendix E, pp. 222-223).

Nothing in the record shows that Fashion Bug ever had any policy *forbidding* store managers, such as Ms. Jawoszek, from refusing to accept customer returns where the customer lacked a receipt. In other words, there is no evidence that store managers were required to accept all customer returns.[4] Ms. Burnside's evidence proves only that the employee return policy *did not extend to* customers. Thus, for the Circuit Court to

[4] Ms. Jawoszek testified that she refused to accept Ms. Withers return because there was no receipt and the merchandise appeared to be the same merchandise that Ms. Burnside had earlier sought to return without a receipt. (Appendix E, pp. 207-213).

conclude that Ms. Jawoszek was accused of "violating the same company policy" as Ms. Burnside required an extraordinary leap of logic that was wholly unsupported by the record.[5]

Because Fashion Bug's employee return policy did not extend to ordinary customers, Ms. Jawoszek could not have "violated" that policy by refusing to accept a customer return. At most, the record shows only that Ms. Jawoszek was the subject of a complaint, from a customer, regarding the quality of her service. That is not "similar" to Fashion Bug's contention that Ms. Burnside attempted to violate an official company policy forbidding employees from making returns without receipts. No reasonable trier of fact could find otherwise.

Moreover, even if Fashion Bug did have a *second* company policy forbidding store managers from refusing customer exchanges, the existence of such a "policy" could not provide a rational basis for claiming that Ms. Burnside and Ms. Jawoszek were "similarly situated." Among the differences between the two situations are the facts that (1) two different policies would be involved, with Ms. Burnside and Ms. Jawoszek accused of violating different policies, (2) Ms. Burnside and Ms. Jawoszek occupied different positions within the company, one being a rank and file employee and the other a store manager, (3) Ms. Burnside was accused of misconduct by anther employee while the allegation against Ms. Jawoszek was made by a customer, and, most importantly, (4) Ms. Jawoszek was accused of providing poor customer service while Ms. Burnside was

[5] A review of Ms. Burnside's response to Fashion Bug's motion for reconsideration in the Court of Appeals demonstrates that Ms. Burnside can point to no evidence contradicting Fashion Bug's account of the record. Her "best" material does not come close to showing that Ms. Burnside and Ms. Jawoszek were treated differently for violating the same company policy. (*See* Appendix F).

accused of attempting to violate a policy designed to thwart specific "problems" Fashion Bug was having with employee returns. No useful comparison can be made between these two dissimilar situations. Additionally, the record shows that Ms. Kerins—the supervisor who made the decision to terminate Ms. Burnside's employment—did not even know that a customer had complained about Ms. Jawoszek's refusal to accept a customer return without a receipt. (Appendix E, p 460). "[T]o be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v Toledo Hosp*, 964 F2d 577, 583 (6th Cir. 1992).[6]

Finally, Ms. Burnside offered no evidence that Fashion Bug had a specific policy for investigating complaints against its employees (whether from customers alleging poor customer service or fellow employees alleging violations of company policy). To the contrary, Ms. Kerins testified that Fashion Bug had no "standard procedure" or policy for pre-termination investigations, because every situation is different. (Appendix E, p. 444, 456-458) Thus, there is no evidentiary basis for the Circuit Court's conclusion that Ms. Burnside and Ms Jawoszek were "similarly situated."

[6] The MCRC majority recognized *Mitchell* as controlling, though it then proceeded to ignore *Mitchell's* holding. (Appendix B, p 7).

C. *Whether Fashion Bug was factually correct in its conclusion that Ms. Burnside violated, or attempted to violate, a company policy is not relevant to the question whether Fashion Bug acted with discriminatory animus.*

It is undisputed that Fashion Bug proffered a non-discriminatory reason for its termination of Ms. Burnside: She was discharged because of her apparent attempt to violate Fashion Bug's employee return policy. The articulation of this legitimate, non-discriminatory reason for Fashion Bug's actions had the effect of causing the initial rebuttable presumption of discrimination (*i.e.*, the prima facie case) to drop away. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001). Once this occurred, the dispositive question became "whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision." *Id.* at 466. In other words: was the employer's stated reason a pretext for unlawful discrimination? *Id.* at 466-467.

The Court of Appeals first concluded that Fashion Bug's proffered reason for terminating Ms. Burnside was pretextual because it had "no basis in fact." See *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Specifically, the Court opined that Fashion Bug's proffered reason had "no basis in fact" because Ms. Burnside actually had a receipt and, therefore, was not actually guilty of violating the policy. The question whether Fashion Bug was correct in its determination that Ms Burnside violated the policy is beside the point. What matters is whether Fashion Bug acted with discriminatory animus. See, e.g. *Hazle*, *supra* at 465 n 7. Because Fashion Bug's good faith belief—and not the accuracy of its conclusion—is really at issue, the Court should

not second-guess whether Ms. Burnside *actually* violated the policy. *Id.* An employer is entitled to be "wrong," so long as it does not act with discriminatory animus.[7]

Here, the record shows that Fashion Bug's proffered reason *did* have some "basis in fact." Specifically, Ms. Kerins testified that she decided to terminate Ms. Burnside's employment because she believed Ms. Jawoszek's account of the incident in the Warren store. (Appendix E, pp. 461-462, 474). Ms. Jawoszek testified that Ms. Burnside had a receipt for one item, but also sought to return at least six or seven other items for which she had no receipt. (Appendix E, pp. 186-187). Ms. Kerins decision to accept Ms. Jawoszek's statement as a credible account of the events at the Warren store is not evidence of discriminatory animus.[8] It is evidence that the *proffered* reason for Ms. Burnside's discharge (*i.e.*, the reason articulated in this litigation) was the *actual* reason for her discharge. That is the factual question to which the "no basis in fact" language in *Feick, supra*, is properly directed.

Clearly, the *Feick* language is somewhat confusing and subject to misapplication. That is borne out by the fact that the MCRC, the Circuit Court, and the Court of Appeals panel all concluded that Ms. Burnside's evidence that she did not *in fact* violate the company policy as accused constituted valid evidence of pretext. A per curiam opinion from this Court clarifying the true meaning of *Feick* would be valuable to the bench and bar.

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[7] Under the Court's holding, any protected individual discharged for perceived misconduct that did not actually occur would have a cause of action for discrimination without respect to the question whether the employer actually harbored discriminatory animus.

[8] Ms. Burnside has offered no evidence that Ms. Jawoszek's statement did not exist, or that Ms. Kerins did not truly believe the statement.

D. ***The allegedly discriminatory remark made by Ms. Jawoszek is not relevant to the question whether Fashion Bug acted with discriminatory animus, because it is undisputed that Ms. Jawoszek had no authority to terminate Ms. Burnside's employment and did not participate in Fashion Bug's decision to terminate Ms. Burnside's employment.***

The Court of Appeals also erroneously relied on Ms. Jawoszek's "you people" comment as evidence of *Fashion Bug's* discriminatory animus. It is undisputed that Ms. Kerins, and not Ms. Jawoszek, made the decision to terminate Ms. Burnside. Nothing in the record suggests that Ms. Jawoszek (who was the store manager of a different store) had any authority to terminate Ms. Burnside's employment, or that she took part in Fashion Bug's decision regarding Ms. Burnside's discharge. Nevertheless, the Court of Appeals explained that Ms. Jawoszek's remarks were attributable to Fashion Bug because "Jawoszek was an agent of the decisionmaker who decided to terminate [Ms. Burnside's] employment." (Appendix D, p. 4). The record contains no such evidence.

Instead of addressing the question whether Ms. Jawoszek had decisionmaking authority with respect to Ms. Burnside's discharge (which she did not), the Court of Appeals apparently accepted the Circuit Court's reasoning that Ms. Jawoszek's attitudes towards race were relevant because it was Ms. Jawoszek's complaint about Ms. Burnside that initiated the investigation process which ultimately led to Ms. Burnside's termination. (Appendix D, p. 3). This is not enough. A remark made by an employee *not* participating in the decisionmaking process should be irrelevant. See *Krohn v Sedgwick James of Michigan, Inc.*, 244 Mich App 289, 300; 624 NW2d 212 (2001). (holding that an allegedly discriminatory remark made by a former managerial employee was irrelevant because there was no evidence "that he had any decisionmaking authority

regarding the discharging of plaintiff"). Here, there is no evidence that Ms. Jawoszek had any decisionmaking authority with respect to Ms. Burnside's discharge.

RELIEF REQUESTED

For the reasons stated above, Fashion Bug respectfully asks this Court to exercise its discretion and grant relief, in some form, to Fashion Bug. This relief could be (i) an order granting Fashion Bug's application for leave to appeal, (ii) an order peremptorily reversing the Court of Appeals decision, (iii) a per curiam opinion reversing the Court of Appeals, or (iv) an order remanding the case to the Court of Appeals with instructions to address the issue left unresolved in its initial opinion. This Court may also wish to adopt as its own the recommendation of hearing officer Kerner or the opinion of the dissenting member of the MCRC. As an additional alternative to a grant, this Court may wish to issue a per curiam opinion clarifying the potentially confusing language of *Feick*, *supra*, and explaining that Ms. Burnside's evidence that she did not *in fact* violate the company policy as accused did not constituted valid evidence of pretext.

Respectfully submitted,

CLARK HILL PLC

By: _____

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Date: May 28, 2004

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Fitzgerald, P.J., and Zahra and Fort Hood, JJ.)

MICHIGAN DEPARTMENT OF CIVIL RIGHTS ex rel BERNETTE BURNSIDE,

Claimant-Appellee,

vs.

FASHION BUG OF DETROIT, INC.,

Respondent-Appellant.

Supreme Court No. _____

Court of Appeals No. 240325

Wayne Circuit No. 01-116726-AA

MDCR No. 122300-EM06

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RESPONDENT-APPELLANT'S NOTICE OF HEARING

TO: Counsel of Record

PLEASE TAKE NOTICE that Respondent-Appellant's Application for Leave to Appeal will be heard on **Tuesday, June 22, 2004**. There will be no oral argument.

Respectfully submitted,

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Dated: May 28, 2004

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PROOF OF SERVICE

Jill M. Beyer of Clark Hill, PLC, being duly sworn, says that on May 28, 2004, she served via U.S. mail a copy of the Respondent-Appellant's Application for Leave to Appeal, Notice of Hearing, and this Proof of Service upon:

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by enclosing a copy of the same in an envelope as indicated and depositing same in a United States mail receptacle in Detroit, Michigan.

Jill M. Beyer

Subscribed and sworn to before me
This 28th day of May 2004.

KAREN SCOTT-MOORE
Notary Public, Wayne County, MI
My Commission Expires Jul. 26, 2005

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